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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SPIRALEDGE, INC.,  
  
Plaintiff,  
  
vs.

CASE NO. 13cv296-WQH-BLM  
  
ORDER

SEAWORLD ENTERTAINMENT,  
INC.; SEAWORLD PARKS &  
ENTERTAINMENT, INC.;  
SEAWORLD PARKS &  
ENTERTAINMENT LLC; SEA  
WORLD LLC; and DOES 1-10,  
inclusive,  
  
Defendants.

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SEAWORLD PARKS &  
ENTERTAINMENT, INC.;  
SEAWORLD PARKS &  
ENTERTAINMENT LLC; SEA  
WORLD LLC,  
  
Counterclaimants,  
  
vs.  
  
SPIRALEDGE, INC.,  
  
Counter-Defendant.

HAYES, Judge:

The matter before the Court is the Motion for Preliminary Injunction filed by Plaintiff Spiraledge, Inc. (“Spiraledge”). (ECF No. 28).

1 **I. Background**

2 On February 5, 2013, Spiraledge initiated this action by filing a Complaint in this  
3 Court. (ECF No. 1). On March 12, 2013, Spiraledge filed a First Amended Complaint  
4 against Defendants SeaWorld Entertainment, Inc., SeaWorld Parks & Entertainment,  
5 Inc., SeaWorld Parks & Entertainment LLC, and Sea World LLC (collectively,  
6 “SeaWorld”). (ECF No. 9). Spiraledge alleges that it owns a trademark registered with  
7 the United States Patent and Trademark Office (“USPTO”) for the mark “Aquatica” for  
8 online retail and wholesale store services featuring swimwear, clothing and accessories,  
9 and online directories featuring information relating to water-related activities. *Id.* ¶¶  
10 10-12. Spiraledge alleges that SeaWorld owns and operates a chain of water parks  
11 using the mark Aquatica and sells swimwear, clothing and accessories with the  
12 Aquatica mark prominently displayed on them. *Id.* ¶¶ 18-19. Spiraledge alleges that  
13 SeaWorld’s use of the Aquatica mark constitutes trademark infringement in violation  
14 of the Lanham Act, 15 U.S.C. § 1114, unfair competition in violation of the Lanham  
15 Act, 15 U.S.C. § 1125(a), and unfair competition in violation of California Business and  
16 Professions Code § 17200. Spiraledge seeks compensatory damages, an award of  
17 SeaWorld’s profits and disgorgement of SeaWorld’s revenues, treble damages, punitive  
18 damages, injunctive relief, and attorneys’ fees and costs.

19 On March 12, 2013, SeaWorld filed an Answer and Counterclaims against  
20 Spiraledge. (ECF No. 10). SeaWorld seeks cancellation of Spiraledge’s trademark  
21 registration, alleging fraud in the procurement and improper registration.

22 On April 17, 2013, Spiraledge filed the Motion for Preliminary Injunction,  
23 accompanied by evidence. (ECF Nos. 28-30). Pursuant to Federal Rule of Civil  
24 Procedure 65(a), Spiraledge moves for a preliminary injunction prohibiting SeaWorld  
25 from using its Aquatica and “Aquatica SeaWorld’s Waterpark” marks, or any other  
26 confusingly similar mark in connection with SeaWorld’s water parks and associated  
27 goods and services.

28 On May 6, 2013, SeaWorld filed an opposition to the Motion for Preliminary

1 Injunction, accompanied by evidence and objections to certain evidence submitted by  
2 Spiraledge. (ECF Nos. 34-35, 37, 42).

3 On June 13, 2013, Spiraledge filed a reply in support of the Motion for  
4 Preliminary Injunction, accompanied by evidence, a response to SeaWorld's evidentiary  
5 objections, and objections to certain evidence submitted by SeaWorld. (ECF Nos. 48-  
6 50).

7 On June 20, 2013, SeaWorld filed a response to the new evidence submitted by  
8 Spiraledge with its reply, and a response to Spiraledge's evidentiary objections. (ECF  
9 Nos. 53-54).

10 On June 27, 2013, the Court heard oral argument on the motion.

## 11 **II. Discussion**

12 "[A] preliminary injunction is an extraordinary and drastic remedy, one that  
13 should not be granted unless the movant, *by a clear showing*, carries the burden of  
14 persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation omitted). "A  
15 plaintiff seeking a preliminary injunction must establish that he is likely to succeed on  
16 the merits, that he is likely to suffer irreparable harm in the absence of preliminary  
17 relief, that the balance of equities tips in his favor, and that an injunction is in the public  
18 interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations  
19 omitted).

20 "[T]he person or entity seeking injunctive relief must demonstrate that irreparable  
21 injury is *likely* in the absence of an injunction. An injunction will not issue if the person  
22 or entity seeking injunctive relief shows a mere possibility of some remote future injury,  
23 or a conjectural or hypothetical injury." *Park Vill. Apartment Tenants Ass'n v.*  
24 *Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) (quotations omitted); *see*  
25 *also Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)  
26 ("At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that  
27 it will be exposed to irreparable harm. Speculative injury does not constitute irreparable  
28 injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more

1 than merely allege imminent harm sufficient to establish standing; a plaintiff must  
2 *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive  
3 relief.”) (citations omitted). “Typically, monetary harm does not constitute irreparable  
4 harm.... Economic damages are not traditionally considered irreparable *because the*  
5 *injury can later be remedied by a damage award.*” *Cal. Pharmacists Ass’n v. Maxwell-*  
6 *Jolly*, 563 F.3d 847, 851-52 (9th Cir. 2009) (citing, *inter alia*, *Sampson v. Murray*, 415  
7 U.S. 61, 90 (1974) (“[I]t seems clear that the temporary loss of income, ultimately to  
8 be recovered, does not usually constitute irreparable injury.... The possibility that  
9 adequate compensatory or other corrective relief will be available at a later date, in the  
10 ordinary course of litigation, weighs heavily against a claim of irreparable harm.”);  
11 *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603  
12 (9th Cir. 1991) (“[E]conomic injury alone does not support a finding of irreparable  
13 harm, because such injury can be remedied by a damage award.”)). However, courts  
14 have “recognized that intangible injuries, such as damage to ongoing recruitment efforts  
15 and goodwill, qualify as irreparable harm.” *Rent-A-Center, Inc.*, 944 F.2d at 603 (citing  
16 *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 519-20 (9th Cir. 1984)).

17 “Previously, the rule for preliminary injunctions in the trademark context was  
18 that courts presumed irreparable injury if the moving party showed likelihood of  
19 success on the merits.” *BoomerangIt, Inc. v. ID Armor, Inc.*, No. 5:12-CV-0920, 2012  
20 WL 2368466, at \*3 (N.D. Cal. June 21, 2012) (citing *Brookfield Commc’ns, Inc. v. West*  
21 *Coast Entm’t Corp.*, 174 F.3d 1036, 1066 (9th Cir. 1999)). “Recent precedent,  
22 however, has cast doubt on that presumption. Specifically, *eBay Inc. v. MercExchange,*  
23 *L.L.C.*, 547 U.S. 388, 393 (2006) and *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*,  
24 654 F.3d 989, 1000 (9th Cir. 2011) rejected similar presumptions in the patent and  
25 copyright contexts. In light of these cases and the Supreme Court’s restatement of the  
26 standard for issuing a preliminary injunction in *Winter*, the viability of the presumption  
27 of irreparable harm in the trademark context is in question.” *Id.*; *see also Flexible*  
28 *Lifeline Sys.*, 654 F.3d at 997 (noting that any “statements made in passing” in *Marlyn*

1 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873 (9th Cir. 2009)  
2 “does not bind this panel or constitute an affirmation of the presumption’s continued  
3 vitality”). In *BoomerangIt*, the court concluded: “District courts in this Circuit that  
4 have addressed this issue have found that the governing law has changed, and a plaintiff  
5 is not granted the presumption of irreparable harm upon a showing of likelihood of  
6 success on the merits. Similarly, this court will not assume the existence of irreparable  
7 injury due to a showing of success on the merits.” *BoomerangIt*, 2012 WL 2368466,  
8 at \*4 (collecting cases); *see also Jumbo Bright Trading Ltd. v. Gap, Inc.*, No.  
9 CV12-8932, 2012 WL 5289784, at \*1 (C.D. Cal. Oct. 25, 2012) (“As far as this court  
10 is aware, every district court in the Ninth Circuit that has examined the issue after  
11 *Flexible Lifeline*, along with a number that analyzed the issue before that case, has  
12 either found or at least suggested that irreparable harm cannot be presumed in trademark  
13 cases as well.”) (collecting cases). This Court is persuaded by the reasoning of  
14 *BoomerangIt*, and this Court will not assume the existence of irreparable injury. *See*  
15 *Flexible Lifeline Sys.*, 654 F.3d at 997 (“If our past standard, which required a plaintiff  
16 to demonstrate at least a possibility of irreparable harm, is ‘too lenient’ [according to  
17 the Supreme Court in *Winter*], then surely a standard which presumes irreparable harm  
18 without requiring any showing at all is also ‘too lenient.’”). Accordingly, *Spiraledge*  
19 “must *demonstrate* that irreparable injury is likely in the absence of an injunction.”  
20 *Park Vill. Apartment Tenants Ass’n*, 636 F.3d at 1160 (emphasis added).

21         *Spiraledge* submits the declaration of its CEO, Avi Benaroya, in support of the  
22 Motion for Preliminary Injunction. (ECF No. 28-41). Benaroya states: “After we built  
23 out the website at *Aquatica.com* and launched the *Aquatica* brand in 2008, sales of the  
24 products took off.” *Id.* ¶ 17. *Spiraledge*’s revenues were \$21,283 in 2008, \$409,349  
25 in 2009, \$558,112 in 2010, \$776,722 in 2011, \$523,296 in 2012, and \$188,012 in 2013  
26 through April 7, 2013. *Id.* Benaroya states that when the USPTO issued the  
27 registration for the *Aquatica* mark to *Spiraledge* on December 27, 2011, “*SeaWorld* had  
28 been using its own *Aquatica* marks in connection with its water park in Orlando, Florida

1 ... and had built a substantial presence and engaged in extensive advertising online, such  
2 that we had trouble continuing to grow Aquatica.com and Spiraledge's Aquatica  
3 brand." *Id.* ¶ 18. Benaroya states: "SeaWorld's use of its own Aquatica marks that are  
4 identical and confusingly similar to Spiraledge's Aquatica mark has led to numerous  
5 instances of actual confusion involving consumers.... This has further hampered our  
6 efforts to continue growing the Aquatica brand." *Id.* ¶ 19.

7 Attached to Benaroya's declaration are fifteen "written inquiries submitted  
8 through Aquatica.com [between December 1, 2008 and August 21, 2012] that appear  
9 to indicate confusion among customers between SeaWorld's Aquatica marks and  
10 Spiraledge's Aquatica mark." *Id.* ¶ 20; *see also* ECF No. 28-46. Each of the fifteen  
11 inquiries appear to involve customers directing inquiries through Spiraledge's website,  
12 Aquatica.com, intended for SeaWorld and related to SeaWorld's water park. The only  
13 inquiry related to clothing was a February 11, 2009 complaint from a person who  
14 purchased a "beautiful" "Aquativa [sic] SeaWorld's Waterpark Hooded Long [S]leeve  
15 Pocket in [F]ront sweatshirt from Your Park," but the "applique came off," which was  
16 "not acceptable." (ECF No. 28-46 at 4).

17 Spiraledge submits a declaration from Serrina Aguirre, an employee of an entity  
18 related to Spiraledge, who states that she received phone calls and written inquiries  
19 directed "to Aquatica.com customer service with issues related to and questions about  
20 SeaWorld's Aquatica water park(s) and associated goods and services." (Aguirre Decl.  
21 ¶ 3, ECF No. 28-47). Spiraledge also submits a declaration from Michele Mughannam,  
22 a former employee of an entity related to Spiraledge, who states that, from April 2009  
23 through May 2010, she marketed Spiraledge's Aquatica products directly to potential  
24 wholesale customers. She states:

25 [A]pproximately half of the prospective buyers I reached on the telephone  
26 asked in the initial conversation if the Aquatica products I was marketing  
27 and selling were made by SeaWorld or were related to SeaWorld's  
28 Aquatica water parks, or if [Spiraledge's predecessor] was part of or  
related to SeaWorld. I repeatedly had to explain to them that there was no  
connection between the companies or their products.

(Mughannam Decl. ¶ 2, ECF No. 28-48).

1       Spiraledge contends:

2       SeaWorld's extensive use of its infringing marks online to advertise its  
3       water parks and associated goods and services has significantly harmed  
4       Spiraledge's Aquatica business, and if it is not stopped, will render the  
5       business invisible in the marketplace. For example, when searching for  
6       'aquatica' on Google, seven of the top eight results, including one paid ad,  
7       are SeaWorld websites or related to SeaWorld's Aquatica water parks.  
8       Meanwhile, because of SeaWorld's extensive use, Spiraledge's  
9       Aquatica.com is pushed to the second page. When searching for 'aquatica  
10       clothing' on Google, the first and third results are SeaWorld websites  
11       surrounding [Spiraledge's website] SwimOutlet.com in the second  
12       position.

13       (ECF No. 28-1 at 12 (citing Steinberg Decl., Exs. 15, 16, ECF Nos. 28-17, 28-18)).

14       Although "[e]vidence of threatened loss of prospective customers or goodwill  
15       certainly supports a finding of the possibility of irreparable harm," *Stuhlbarg*  
16       *International Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 841 (9th Cir.  
17       2001), "[s]peculative injury does not constitute irreparable injury." *Goldie's Bookstore,*  
18       *Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). After review  
19       of the evidence filed in support of the Motion for Preliminary Injunction, the Court  
20       finds that Spiraledge has failed to submit probative, nonspeculative evidence that  
21       Spiraledge has lost, or likely will lose, prospective customers or goodwill due to  
22       SeaWorld's use of the Aquatica mark.

23       The statements of Spiraledge's CEO indicating that SeaWorld has "hampered  
24       [Spiraledge's] efforts to continue growing the Aquatica brand," Benaroya Decl. ¶ 19,  
25       ECF No. 28-41, are conclusory and without citation to specific evidence; accordingly,  
26       these statements are insufficient to support a finding of irreparable injury. *See Am.*  
27       *Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985)  
28       ("affidavits [that] are conclusory and without sufficient support in fact" will not support  
a finding of irreparable injury); *see also Oakland Tribune, Inc. v. Chronicle Publ'g Co.*,  
762 F.2d 1374, 1377 (9th Cir. 1985) (insufficient showing of irreparable injury when  
"the principal shareholder of plaintiff's parent corporation ... stated [in an affidavit] that  
defendants' use of exclusivity provisions caused plaintiff's market share to decrease,"  
because the affidavit "provided only conclusory statements and [the affiant] was an

1 interested party”).

2       Spiraledge has presented no evidence indicating that Spiraledge has suffered, or  
3 likely will suffer, irreparable injury caused by SeaWorld’s internet presence, including  
4 SeaWorld’s positioning in search engine results. Spiraledge has cited no authority  
5 indicating that irreparable injury may be found or presumed based upon positioning in  
6 Google searches. Spiraledge has presented no evidence indicating that it has lost sales  
7 or it likely will lose sales due to SeaWorld’s positioning in Google searches or that the  
8 amount of those lost sales could not be remedied by monetary damages. Likewise,  
9 Spiraledge has failed to present evidence indicating that it has suffered, or likely will  
10 suffer, irreparable injury as a result of misdirected phone calls and internet inquiries.  
11 *Cf. Lang v. Ret. Living Publ’g Co., Inc.*, 949 F.2d 576, 583 (2d Cir. 1991) (“[Plaintiff]  
12 has not shown that these misdirected callers were prospective purchasers of [plaintiff]’s  
13 products.... [T]here is no reason to believe that confusion represented by the phone calls  
14 could inflict commercial injury in the form of either a diversion of sales, damage to  
15 goodwill, or loss of control over reputation.”).

16       A “long delay before seeking a preliminary injunction implies a lack of urgency  
17 and irreparable harm.” *Oakland Tribune*, 762 F.2d at 1377 (citation omitted); *see also*  
18 *id.* (“Where no new harm is imminent, and where no compelling reason is apparent, the  
19 district court was not required to issue a preliminary injunction against a practice which  
20 has continued unchallenged for several years.”). SeaWorld opened its first water park  
21 under the Aquatica name in Orlando, Florida on March 1, 2008. (Brown Decl. ¶ 3, ECF  
22 No. 34-2). Spiraledge obtained its registration for the Aquatica mark on December 27,  
23 2011. (Benaroya Suppl. Decl. ¶ 3, ECF No. 48-9). SeaWorld opened its second  
24 Aquatica water park in San Antonio, Texas on May 19, 2012. (Brown Decl. ¶ 3, ECF  
25 No. 34-2). Spiraledge initiated this action by filing a Complaint in this Court on  
26 February 5, 2013. (ECF No. 1). Spiraledge filed the Motion for Preliminary Injunction  
27 on April 17, 2013. (ECF No. 28).

28       Spiraledge’s CEO, Avi Benaroya, submitted a declaration stating that the delay



1 of over 13 months between the date Spiraledge obtained its Aquatica registration and  
2 the filing of this lawsuit was due to “the withdrawal of our trademark litigation counsel  
3 and the necessity of finding new trademark litigation counsel,” and “settlement  
4 negotiations with SeaWorld.” (Benaroya Suppl. Decl. ¶ 2, ECF No. 48-9). SeaWorld  
5 submits an affidavit from its attorney stating that the majority of the “settlement  
6 negotiations” referenced by Benaroya consisted of SeaWorld’s attorney repeatedly  
7 contacting Spiraledge’s attorney between June 30, 2012 and November 1, 2012, seeking  
8 Spiraledge’s “consent to the registration of SeaWorld’s Aquatica mark since this mark  
9 had been coexisting with [Spiraledge]’s Aquatica retail swimwear website without  
10 confusion for years.” (Anderson Decl. ¶ 4, ECF No. 54-2). There is no evidence that,  
11 prior to the filing of the Complaint on February 5, 2013, any Spiraledge attorney or  
12 representative asserted that Spiraledge had been suffering irreparable injury from  
13 SeaWorld’s use of its Aquatica mark. Even accepting Benaroya’s explanation of the  
14 delay, the Court finds that Spiraledge’s delay between obtaining the registration and  
15 filing suit and the Motion for Preliminary Injunction further supports the conclusion  
16 that Spiraledge has failed to demonstrate that irreparable injury is likely in the absence  
17 of an injunction. *See Oakland Tribune*, 762 F.2d at 1377; *see also Lydo Enters. v. City*  
18 *of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) (“A delay in seeking a  
19 preliminary injunction is a factor to be considered in weighing the propriety of relief.”);  
20 *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 55 F. Supp. 2d 1070, 1090 (C.D.  
21 Cal. 1999) (“[Plaintiff]’s [five-month] delay in seeking injunctive relief further  
22 demonstrates the lack of any irreparable harm.”), *aff’d*, 202 F.3d 278 (9th Cir. 1999);  
23 *Valeo Intellectual Prop., Inc. v. Data Dep’t Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D.  
24 Wash. 2005) (“A three-month delay in seeking injunctive relief is inconsistent with  
25 [plaintiff]’s insistence that it faces irreparable harm.”).

26 The Court finds that Spiraledge has failed to “demonstrate that irreparable injury  
27 is likely in the absence of an injunction.” *Park Vill. Apartment Tenants Ass’n*, 636 F.3d  
28 at 1160 (quotation omitted). Because Spiraledge has failed to meet its burden of

1 demonstrating that irreparable injury is likely in the absence of an injunction, the Court  
2 “need not decide whether [SpiralEdge] is likely to succeed on the merits.” *Oakland*  
3 *Tribune*, 762 F.2d at 1376 (“Under any formulation of the test, plaintiff must  
4 demonstrate that there exists a significant threat of irreparable injury. Because the  
5 [plaintiff] has not made that minimum showing we need not decide whether it is likely  
6 to succeed on the merits.”) (citations omitted); *see also Arcamuzi v. Continental Air*  
7 *Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) (same).

8 **III. Conclusion**

9 IT IS HEREBY ORDERED that the Motion for Preliminary Injunction is  
10 DENIED. (ECF No. 28).

11 DATED: July 9, 2013

12   
13 **WILLIAM Q. HAYES**  
14 United States District Judge  
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